SUPREME COURT, U. S.
FILED
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 935

PAUL CLARK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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Akron, Ohio 44308,
Counsel for Petitioner.

MILLER & MOSER,
Of Counsel.

THE GAZETTE LEGAL PUBLISHING CO., AKRON, OHIO—PHONE 434-5545

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

PAUL CLARK,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this cause on October 12, 1966, dismissing the appeal of the petitioner from a conviction under Ohio Revised Code, sections 2907.10 and 2907.20.

CITATIONS TO OPINIONS BELOW.

The original affidavit and warrant of arrest for the misdemeanor of suspicion in the Municipal Court of Akron, Ohio is unreported and is printed in Appendix, *infra,* pp. 17-18.

The affidavit and warrant of arrest for a felony in the Municipal Court of Barberton, Ohio is unreported and is printed in Appendix, *infra,* pp. 18-20.

The journal entry of arraignment in the Court of Common Pleas of Summit County, Ohio, is unreported and is printed in Appendix, *infra,* p. 20.

The first journal entry of appointment of counsel in the Court of Common Pleas of Summit County, Ohio, is unreported and is printed in Appendix, *infra*, p. 20.

The second journal entry of appointment of counsel in the Court of Common Pleas of Summit County, Ohio, is unreported and is printed in Appendix, *infra*, p. 21.

The journal entry of verdict, overruling of a motion for new trial and sentence in the Court of Common Pleas of Summit County, Ohio, is unreported and is printed in Appendix, *infra*, pp. 21-23.

The opinion of the Court of Appeals of the Ninth Judicial District of Ohio, Summit County, affirming the conviction is unreported and is printed in Appendix, *infra*, pp. 23-25.

The order of the Supreme Court of Ohio dismissing the appeal is unreported and is printed in Appendix, *infra*, p. 26.

JURISDICTION.

The judgment of the Ohio Supreme Court was entered on October 12, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., section 1257(3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I.

Whether Petitioner's right to counsel was prejudicially affected by the inadequacy of counsel, due to the fact that retained counsel did not consult with Petitioner prior to trial, that trial counsel was appointed the same day of trial, did not have the opportunity to consult with Petitioner, or any defense witnesses prior to commencement of trial, and the trial court denied Petitioner's request for a continuance which prevented adequate preparation for trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

II.

Whether the fact that the trial court permitted testimony concerning an alleged oral confession and statements given by Petitioner at a time when the police investigation had become accusatory, and following hours of interrogation during which Petitioner did not have the benefit of counsel, was not advised of his absolute right to remain silent, and, according to the State's own witnesses, was in such a condition of intoxication as to render him incapable of giving a voluntary statement, is a violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

III.

Whether the action of the police in confiscating certain equipment, which was used as evidence during the trial, constituted an illegal search and seizure, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, since the police had no warrant and the equipment was not seized pursuant to a lawful arrest for the reason that Petitioner, several hours after being

taken into custody, was charged only with the misdemeanor offense of "being a suspicious person" under a city ordinance?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

Amendment XIV, Section 1, Clause 2:

"* * * Nor shall any State deprive any person of life, liberty or property without due process of law * * *."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall isue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

The pertinent portions of the State statutes herein involved are set out below:

Section 2907.10, Ohio Revised Code:

"No person shall in the night season maliciously and forcibly break and enter * * * an uninhabited * * * building * * * with intent to steal property of any value, or with intent to commit a felony."

Section 2907.20, Ohio Revised Code:

"No person shall steal anything of value. Whoever violates this section is guilty of larceny, and, if the value of the thing stolen is sixty dollars or more, shall be imprisoned not less than one nor more than seven years."

The pertinent portion of the City ordinance herein involved is set out below:

Section 1179.01, Akron City Code:

"No suspicious persons shall be found within the City. The following shall be deemed suspicious persons: * * * (b) Any person found wandering about the streets, or any public place, either by day or by night, without being able to give a reasonable and satisfactory account of himself. * * *"

STATEMENT OF THE CASE.

Petitioner, Paul Clark, was tried and convicted, on June 1, 1965, of one count of Breaking and Entering an Uninhabited Building in the Night Season under Section 2907.10, Ohio Revised Code, and one count of Grand Larceny under Section 2907.20, Ohio Revised Code.

On the morning of June 6, 1964, two detectives of the Akron Police Department, apparently following an anonymous phone call, went to a bar in Akron, Ohio, at approximately 9:00 A.M., where they found Paul Clark and two companions in a highly intoxicated condition. Petitioner testified in Court that he had gone to sleep in the front seat of his Buick automobile which was in the bar parking lot and had been roused by one of the detectives, whereupon he was taken into the bar where he and his companions were questioned about an abrasive grinder which one of them, Cliff Fortune, had attempted to sell in the bar.

With Petitioner in their custody, the police searched the automobile and found a number of various items of equipment, pictures of which were later used as evidence in the trial, and the presence of which, as he later testified to (R. 162), came as a surprise to Clark. Apparently believing the equipment to be stolen, but acting upon no evidence to that effect, the police seized the items and proceeded to take Clark and Fortune to the Akron Police Station.

The police then began an interrogation of both men, by different detectives at various times, which lasted several hours. During this time, according to the testimony of the police themselves, and other State's witnesses, petitioner was still greatly intoxicated. The evidence later developed that Clark had started drinking about 5:00 or 6:00 P.M. on June 5, 1964, consuming large quantities of beer and water glasses of whiskey steadily until the early hours of the morning of June 6, 1964 and then, after sleeping a few hours in the car, resumed drinking about 6:30 A.M. before being taken into custody (R. 148-152).

At no time, either at the bar or at the police station, was Clark advised of his absolute right to remain silent nor of his right to assistance of counsel. From shortly after 9:00 A.M. until 3:15 P.M. on June 6, 1964, the police held petitioner in custody without any formal charge being brought against him and without taking him before a Court. Throughout this time, Clark was held in an interrogation room where he was confronted by various Akron detectives, a detective from Barberton, Ohio, a neighboring city in Summit County where the breaking and entering in question took place, as well as the owner of the business. Petitioner, during this time, experienced the educational disadvantage of having quit school in the fourth grade at the age of sixteen (R. 147).

Then, at about 3:15 P.M., Clark was booked under the Akron "suspicious person" ordinance, a misdemeanor under Section 1179.01, Akron City Code, and on no other charge (Appendix, *infra,* pp. 17-18). The Akron Police sometime during the day determined that the equipment they had seized belonged to the All-Gas Products Company of Barberton, Ohio, and so, they turned petitioner over to the Barberton Police on June 8, 1964. Clark was not charged with any felony until September 8, 1964, when the Barberton Police signed an affidavit (Appendix *infra,* pp. 18-20).

Petitioner was indicted December 18, 1964. He entered a plea of not guilty at arraignment on January 15, 1965, and the journal entry of that date (Appendix, *infra,* p. 20) recites Attorney Patrick Simon of Akron, Ohio, as attorney of record for Clark. However, on May 25, 1965, the day before trial, the court appointed Mr. Simon, upon his request, to represent Clark (journal entry, Appendix, *infra,* p. 20).

On the day of trial, the Court permitted Mr. Simon to withdraw as attorney of record and appointed Attorney Harold Binns of Akron to represent Petitioner upon the request of Mr. Simon, who apparently didn't want to try the case (journal entry, Appendix, *infra,* p. 21).

Mr. Simon and Mr. Binns are not associated together and, in fact, are practicing from different buildings in the City of Akron which are located some seven blocks apart.

Petitioner, through Mr. Binns, asked the Court, at the time of trial, for a continuance in order to locate and confer with certain potential defense witnesses (R. 3). Upon inquiry by the Court as to whether Clark was represented by counsel prior to trial, this reply was given by Mr. Simon:

> "Mr. Simon: I haven't been in touch with the client during that time, your Honor."

The Court overruled the request for a continuance and thereupon, Petitioner was forced to trial with counsel who was appointed that same day and who had no opportunity to confer with Clark or any defense witnesses (R. 4, 5).

During the trial, the Court permitted testimony from various witnesses concerning statements and confessions allegedly made by Petitioner while in custody of the police. The owner of the business, who was called to the Akron Police Station, was the first and was permitted to testify, over objection of defense counsel, as follows:

> "He * * * he said that, 'All right, I could have, I could have done this,' he said. 'All right, maybe I did do it.'" (R. 36.)

A Barberton police sergeant was permitted to testify, over objection of defense counsel, that Petitioner stated, on different occasions, during questioning:

> "It looks like you have got me * * *." (R. 52.)
>
> "Well, I probably did it but I can't recall because I have been drinking so much." (R. 56.)

An Akron detective testified as follows:

> "* * * so after interrogating Mr. Clark for a while he admitted that he had said that he was drinking in the afternoon and that was of June 5th at Walt's Inn, and there he met a man, he didn't know the man, but they struck up an acquaintance and from there went down to the Akron Cafe and they were drinking there, and after the bars closed he said he and this man that he didn't know his name had went to Barberton and there he said they broke into a place." (R. 85, 86.)

There is no indication in the record of proceedings that Petitioner was ever informed of his absolute right to remain silent nor of his right to counsel.

However, the State's witnesses had the following to say concerning the condition of intoxication Petitioner was in during the time of interrogation and the alleged confession:

1. Mr. Smerglia, owner of the business:

"Q. * * * Did you observe the condition of Mr. Clark at the police station?

A. Yes.

Q. What was his physical condition?

A. He had been drinking.

Q. Was he drunk at that time?

A. I would say he was intoxicated. * * *

Q. * * * Was he drunk at the time he made this particular statement you overheard?

A. He was in the same condition he was in, yeah, I would say so." (R. 45.)

2. Detective Pramik, Barberton Police Department:

"A. * * * I did see Mr. Clark and he was asleep. * * *

Q. Was Paul Clark drunk when you saw him the morning of June 6th?

A. It is obvious he had been drinking." (R. 58.)

3. Detective Carlton, Akron Police Department:

"Q. What was his condition at the time you saw him in the police station at approximately ten o'clock? Was that on June 6th?

A. That is correct, your Honor.

Q. Would you tell us?

A. Well, he was in my opinion—he was pretty high. He had been drinking considerably and he was pretty high." (R. 81.)

4. Detective Louthan, Akron Police Department:

"Q. Now, were either of these gentlemen drunk?

A. No, I wouldn't say they were drunk. I will admit they had been drinking." (R. 89.)

Petitioner testified that he was so intoxicated that when the police took him to the station, they had to let him sleep on a bench in the interrogation room (R. 156).

Pictures of a display, laid out by the police, of the equipment which they had seized from Petitioner, were introduced into evidence over the objection of defense counsel (R. 96). Further, testimony was given by virtually all of the State's witnesses concerning the equipment.

Defense counsel moved for a directed verdict for Petitioner. (R. 96.)

REASONS FOR GRANTING THE WRIT.

I.

There is no doubt that an accused in a criminal case is entitled to have counsel. *Gideon vs. Wainwright*, 372 U.S. 335 (1963); Sixth and Fourteenth Amendments, U.S. Constitution; Article I, Section 10, Ohio Constitution.

This absolute right to have counsel, by necessity, incorporates the concept that appointed counsel be competent and permitted to represent the accused in an adequate manner. Certainly, one of the reasons for this right is the belief that a defendant is entitled to a fair trial, including a sufficient time for appointed counsel to prepare for trial in order to protect the rights of the client. It therefore follows that if counsel has been denied the opportunity to prepare himself for the defense of his client, by extrinsic forces, he has been disarmed of his effectiveness and the accused's rights have been affected by such inadequacy. *Powell vs. Alabama*, 287 U.S. 45 (1932).

With roots extending from the *Powell* case, *supra*, this Court has, down through the years, nourished the principle that there should be no court-imposed impediments to full and complete pretrial representation. *Wil-*

liams vs. Kaiser, 323 U.S. 471 (1945); *Von Moltke vs. Gillies,* 332 U.S. 708 (1948); *Reece vs. Georgia,* 350 U.S. 85 (1955).

A violation of due process was found to exist where appointed counsel had conferred with the accused only briefly and was thereafter denied a request for a continuance in the case of *Hawk vs. Olson,* 326 U.S. 271 (1945).

These propositions have been summarized in the observation in *Powell, supra,* that "consultation, thoroughgoing investigation and preparation * * * [are] vitally important" and in the classic statement from *Hawk, supra,* that "The defendant needs counsel and counsel needs time."

Petitioner's pretrial counsel stated to the Court that he had not conferred with his client at all prior to trial. Trial counsel was appointed the day of trial, did not have the opportunity to talk with and prepare Clark for trial, and was not afforded a chance to locate and interview important defense witnesses. The denial of a continuance for these purposes thwarted the high duty of properly advocating Petitioner's defense.

That the lack of pretrial preparation hurt Clark's cause cannot be denied since a reading of the record of proceedings shows discrepancies in defense witnesses' testimony caused by an absence of pretrial review as to the correct state of facts.

A very tangible consideration in due process of law must be the availability to defense counsel within the allotted time of evidence and witnesses, including pretrial examination. All cases worth contesting demand pretrial familiarity. For the State to enforce less is to infringe upon the accused's right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution. *Joseph vs. United States,* 321 F.2d 710 (9th Cir. 1963), cert. denied, 375 U.S. 977 (1964).

II.

Some of the most damaging evidence permitted against Petitioner was that of the business owner and policemen who testified to confessions supposedly given by Clark after he was taken into police custody.

Even assuming that Petitioner gave such statements, the circumstances under which they were extracted were such as to flagrantly abuse his rights and render their admission into evidence violative of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

This case, in point of time, falls squarely between the recent clarifying pronouncements of this Court in *Escobedo vs. Illinois,* 378 U.S. 478 (1964) and *Miranda vs. Arizona,* 34 L.W. 4521 (1966). Therefore, all of the principles of the *Escobedo* decision are clearly applicable as well as those stated in *Malloy vs. Hogan,* 378 U.S. 1 (1964) and *Griffin vs. California,* 380 U.S. 609 (1965).

Although this Court decided in *Johnson vs. New Jersey,* 34 L.W. 4592 (1966), against retroactive application of *Miranda* beyond the date of the decision, the primary emphasis was upon the fact that the *additional guidelines* set forth there, over and above *Escobedo,* would not be applied retroactively. However, to ignore the *Miranda* decision as it clarifies *Escobedo* would be like the proverbial ostrich sticking his head in the sand. Again and again this Court, in the *Miranda* decision, referred to the holding in *Escobedo,* stating on page 4529:

> "Our holding there (*Escobedo*) stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U.S., at 483, 485, 491. This was no isolated factor, but an essential in-

> gredient in our decision. * * * A different phase of the Escobedo decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation."

In addition to the lack of any warning by the police to Petitioner of his absolute right to remain silent and his right to counsel, there is the additional fact, as established by the state's witnesses, that Clark was intoxicated at the time he was interrogated. This has the dual effect of showing that he could not have intelligently and knowingly waived his rights as set forth in the *Escobedo* decision, but also reveals statements given by Petitioner to be faulty even under the test of "voluntary confessions" existing prior to *Escobedo*. Paul Clark, a fourth grade dropout at the age of sixteen, could hardly be presumed to have given a voluntary statement with the additional handicap of being drunk.

In the appeals below, the state attempted to emphasize that there was no contemporaneous objection by defense counsel to the introduction of the confessions of the Petitioner. This simply is not the case as the references in the Statement of the Case of this Petition and a reading of the record of proceedings will substantiate. Furthermore, defense counsel moved for a directed verdict, which under the ruling of this Court in *Henry vs. Mississippi*, 379 U.S. 443 (1965), would be sufficient to overcome such a state requirement.

For these reasons, the conviction of this defendant should fall as being repugnant to the guarantees against self-incrimination contained in the Fifth Amendment and of the right to counsel under the Sixth Amendment, both of which are required of the states by the Fourteenth Amendment.

III.

There were two versions given at the trial as to how the police searched Petitioner's automobile and seized the equipment, pictures of which were introduced against him over objection. Clark testified that he was asleep in the front seat of the car when he was roused by an Akron detective, questioned and taken to the station after one of the police opened the car trunk and discovered the equipment. The police testified they received an anonymous phone call, went to the bar where Petitioner was trying to sell a grinder and without identifying themselves, asked Clark if he had any other equipment to sell. Clark then took them to the car, opened the trunk to reveal the items, whereupon the police identified themselves and took Petitioner and a companion into custody.

Regardless of which version is accepted, the fact is clear that the police had neither an arrest warrant nor a search warrant at the time. Therefore, for the search and seizure to be lawful and valid it would have to be incident to a lawful arrest which in turn was based upon probable cause to believe a crime had been committed or for a crime which was committed in the presence of the officers. *Draper vs. United States,* 358 U.S. 307 (1959); *Ker vs. California,* 374 U.S. 23 (1963).

As this Court said in *Beck vs. Ohio,* 379 U.S. 89:

> "The constitutional validity of the search in this case, then, must depend upon the constitutional validity of Petitioner's arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the Petitioner had committed or was committing an offense." Id. at p. 91.

At this juncture, it should be noted that this Court, in its decision in *Preston vs. United States,* 376 U.S. 364 (1964) which held a search of defendant's automobile to be unreasonable where it took place after his arrest, seemed to indicate that there should be a limiting of the doctrine of reasonable search incident to a lawful arrest. Reason would dictate that such a limitation is in order. If the accused is arrested and under control of the police, is there at that point a rational criterion for allowing officers to search at their leisure without obtaining a warrant? If the accused is in custody, the necessity for further search would appear to have ceased. If there is a basis for further search, a warrant can readily be secured and if there is no basis for a warrant, there should be no right to search.

But, even if the doctrine is to apply, there remain the questions, what crime had Petitioner committed at the time of his arrest and with what offense was he charged? Clark was held at the police station for about six hours before he was finally charged under a "suspicion" ordinance, a misdemeanor frequently used merely as a holding charge. This charge was later dismissed when felony affidavits were signed by the Barberton police twelve weeks later. The police did not know a crime had been committed until long after Clark's arrest.

Two facts stand out clearly: Paul Clark was not even charged with a crime when he was arrested and thusly, any search and seizure were not incident to a lawful arrest.

Much emphasis was placed by the state, in the appeals below, upon the contention that Petitioner consented to the search of his automobile. However, if the police version of what happened is accepted, even then the officers acted by subterfuge and deception as to their true identity. *Gatewood vs. United States,* 209 F.2d 789 (D.C. Cir.

1953). Consent must be freely and intelligently given, and since the presumption is against waiver of constitutional rights, there should be clear and positive proof of consent. *Gatlin vs. United States,* 326 F.2d 666 (D.C. Cir. 1963); *Wion vs. United States,* 325 F.2d 420 (10th Cir. 1963); *United States vs. Page,* 302 F.2d 81 (9th Cir. 1963).

For these reasons, and upon the additional authority of *Mapp vs. Ohio,* 367 U.S. 643 (1961), Petitioner urges that the pictures of the equipment were wrongly admitted into evidence against him because it was seized by the Akron Police in violation of the Fourth and Fourteenth Amendments.

CONCLUSION.

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. REECE,
Counsel for Petitioner.

MILLER & MORRIS,
Of Counsel.

APPENDIX.

ORIGINAL AFFIDAVIT AND WARRANT OF ARREST FOR THE MISDEMEANOR OF SUSPICION IN THE MUNICIPAL COURT OF AKRON, OHIO, NO. 318837.

AFFIDAVIT.

Before me, a Deputy Clerk of The Municipal Court of the City of Akron, in said County, personally came Glenn Louthan, who being duly sworn according to law, deposes and says that, Paul D. Clark, late of said County, on or about the 6th day of June, 1964, at the City of Akron, in the County of Summit, aforesaid, unlawfully was then and there a suspicious person found within the corporation of the said City of Akron, unable to give a reasonable account of himself, in violation of Section 1179.01 of the Code of the City of Akron, contrary to the form of the Ordinance in such case made and provided, and against the peace and dignity of the said City of Akron, and further this deponent says not.

Signed GLENN LOUTHAN

Sworn to before me and subscribed in my presence this 6th day of June, 1964.

GALE B. GAULT,
Deputy Clerk of the Municipal Court of the City of Akron.

WARRANT.

To Any Police Officer of the City of Akron, Greeting:

You are hereby commanded to take the body of the defendant named in the within affidavit and have said defendant before the Honorable Judge of the Municipal Court of said City forthwith, to answer unto the City of Akron to the charge as set forth in the within affidavit, which is made a part of this warrant, and of this writ make legal service and due return.

Given under my hand and seal of said Court, this 6th day of June, 1964.

GALE B. GAULT,
Deputy Clerk of the Municipal Court of the City of Akron.

RETURN.

Received this writ June 6, 1964.

Served by arresting the within named defendant and have the body now before the Municipal Judge of the City of Akron, Ohio.

GLENN LOUTHAN,
Police Officer of Akron.

AFFIDAVIT AND WARRANT OF ARREST FOR A FELONY IN THE MUNICIPAL COURT OF BARBERTON, OHIO, NO. 34592.

AFFIDAVIT.

Before me, Claudia Bosco, Deputy Clerk of the Barberton Municipal Court, in said County, personally came Rudy Pramik of the Barberton Police Department, who being duly sworn according to law, deposeth and says that Paul Clark of 192 N. Forge Street, Akron, Ohio, late of

said County, on or about the 6th day of June, in the year of our Lord one thousand nine hundred and sixty-four at the City of Barberton, in the County of Summit, aforesaid, unlawfully did break and enter an uninhabited building, dwelling, etc., in the night season, with intent to commit a felony, to-wit: All Gas Products, 1550 W. Waterloo Road, contrary to Revised Code 2907.09, contrary to the form of the Ordinance Statute in such case made and provided, and against the peace and dignity of the City of Barberton, State of Ohio, and further the deponent saith not.

Signed RUDY PRAMIK

Sworn to and subscribed before me at the County aforesaid, this 8th day of September, 1964.

CLAUDIA BOSCO,
Deputy Clerk.

WARRANT.

To the Chief of Police of the City of Barberton, in said County

WHEREAS: Complaint has been made before the Barberton Municipal Court, in said County, upon oath of Rudy Pramik of the Barberton Police Department that Paul Clark of 192 N. Forge Street, Akron, Ohio, late of said County, on or about the 6th day of June, in the year of our Lord one thousand nine hundred and sixty-four at the City of Barberton, in the County of Summit, aforesaid, unlawfully did break and enter an uninhabited building, dwelling, etc., in the night season, with intent to commit a felony, to-wit: All Gas Products, 1550 W. Waterloo Road, contrary to Revised Code 2907.09.

These are therefore to command you to take the said Paul Clark if he is found in your County, or if he shall

have fled, that you pursue after him in any County in the State and take and safely keep the said Paul Clark you have his body forthwith before me to answer said complaint and to be further dealt with according to law.

GIVEN UNDER MY HAND AND SEAL, this 8th day of September, 1964.

CLAUDIA BOSCO,
Deputy Clerk of the Barberton Municipal Court.

JOURNAL ENTRY OF ARRAIGNMENT IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.

Indictment for Breaking & Entering Uninhabited Building in the Night Season (1); Grand Larceny (1).

This day January 15, 1965, came the Prosecuting Attorney on behalf of the State of Ohio, and the defendant Paul Clark being in court in custody of the sheriff, and arraigned upon said indictment, the reading thereof having been waived, for plea thereto says he is "NOT GUILTY" as he stands charged therein, and puts himself upon the county, and the Prosecuting Attorney does the same.

Patrick O. Simon, Attorney for the Defendant.

Defendant released on bond to await trial.

FIRST JOURNAL ENTRY OF APPOINTMENT OF COUNSEL IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.

This day, to-wit, the 25th day of May A. D. 1965, it appearing that the said Defendant, Paul Clark, is in indigent circumstances, and unable to employ counsel, the Court hereby appoints Patrick O. Simon, Attorney at Law, as counsel to defend him in this case.

SECOND JOURNAL ENTRY OF APPOINTMENT OF COUNSEL IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.

This day, to-wit: the 26th day of May A. D. 1965, at the request of counsel for the Defendant, Paul Clark, it is hereby ordered that Patrick O. Simon, Attorney at Law, be permitted to withdraw.

WHEREUPON, it appearing that the said Defendant, Paul Clark, is in indigent circumstances and unable to employ counsel, the Court hereby appoints Harold G. Binns, Attorney at Law, as counsel to defend him in this case.

INDICTMENT FOR: Breaking & Entering Uninhabited Building in the Night Season (1); Grand Larceny (1).

JOURNAL ENTRY OF VERDICT IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.

THIS DAY, to-wit: The 1st day of June A.D., 1965, came the Prosecuting Attorney, James V. Barbuto, by Ted Chuparkoff, Assistant Prosecuting Attorney on behalf of the State of Ohio, the Defendant, Paul Clark, being in Court and accompanied by counsel, Harold G. Binns, the Defendant having heretofore upon arraignment at the January 1965 Term of Court, to-wit: On the 15th day of January A.D., 1965, entered a plea of Not Guilty to the charges of Breaking and Entering Uninhabited Building in the Night Season as contained in Count Number One (1) and Grand Larceny as contained in Count Number Two (2) of the indictment returned against him herein, and the Defendant was released on bond to await trial.

AND THEREAFTER, to-wit: On the 26th day of May A.D., 1965, the Defendant appeared in Court and accom-

panied by counsel for trial, whereupon a Jury was duly empaneled and sworn, and the trial commenced, and not being completed, adjourned from day to day until the 1st day of June, A.D., 1965, at 9:00 o'clock A.M., at which time the jury having heard the testimony adduced by both parties hereto, the arguments of counsel, and the charges of the Court, retired to their room for deliberation. And thereafter, to-wit: On the same day, at 10:00 o'clock A.M., said Jury came again into the Court and returned their verdict in writing finding said Defendant Guilty as charged in Count Number One (1) of the indictment, to-wit: Breaking and Entering Uninhabited Building in the Night Season: and Guilty as charged in Count Number Two (2) of the indictment, to-wit: Grand Larceny. Whereupon the Court considered the motion filed herein by the Defendant for a new trial and hereby overrules said motion.

THEREUPON, the Court being fully advised in the premises, inquired of the said Defendant if he had anything to say why sentence should not be pronounced against him, and said Defendant, Paul Clark, showing no good and sufficient reason therefor, It is the Sentence of the Law and Judgment of the Court that the said Defendant be taken by the Sheriff to the Summit County Jail and there safely kept, and that within Five (5) days he be conveyed to the Ohio State Penitentiary at Columbus, Ohio, there to be imprisoned under the rules and regulations of said Institution for an indeterminate period of not less than One (1) Year and not more than the maximum of Fifteen (15) Years, as provided by Section 2907.10 of the Revised Code of Ohio for punishment of the crime of Breaking and Entering Uninhabited Building in the Night Season: And for an indeterminate period of not less than the minimum of One (1) Year and not more

than the maximum of Seven (7) Years, as provided by Section 2907.20 of the Revised Code of Ohio for punishment of the crime of Grand Larceny, said sentences in each of two counts of the indictment shall run consecutively and not concurrently with each other; and that the said Defendant pay the costs of this prosecution for which judgment is hereby rendered, including counsel fees in the amount of Three Hundred Dollars ($300.00) to be allowed to Attorney Harold G. Binns; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

WILLIAM H. VICTOR, *Presiding Judge.*

OPINION OF THE COURT OF APPEALS OF THE NINTH JUDICIAL DISTRICT OF OHIO, SUMMIT COUNTY.

PER CURIAM:

Paul Clark was convicted by a jury on an indictment containing two counts. He now appeals that conviction claiming many errors that affect his substantial rights. It is not necessary, in this short memorandum, to set out these assignments of error in detail.

On the morning of June 6, 1964, the manager of the All Gas Products Company of Barberton, Ohio, discovered that his place of business had been broken into, and robbed. Invoices were scattered over the floor and display articles were missing. The glass in a rear window was broken, and pieces of glass were scattered on the floor. He reported this to the Barberton police who, shortly afterward, received a call from the police department of the City of Akron inquiring if they had a report of a robbery at the All Gas Products Company. (Among some

articles found in Paul Clark's car was a box of cigars with the name of that company on the box.)

The Akron Police, previous to their call to Barberton, had been told by an anonymous telephone caller that some man (who, it later developed was Paul Clark), was trying to sell some articles at an Akron cafe. Two officers went to the cafe, and Paul Clark offered to sell, at a low price, one of the articles, an abrasive grinder, to one of the officers. The officer, who was in plain clothes, said he was interested in other things; and Paul Clark took the officer to his automobile, opened the trunk, and there displayed all, or nearly all, of the articles that had been stolen from the All Gas Products Company.

When Paul Clark was questioned, he made many statements as to how he had obtained these articles. When glass of the kind from the broken window was found in the rubber sole of his shoe, and a footprint of that shoe was found on some of the invoices, he told the officers he probably went there after the cafe, where he was picked up, had closed, which was, of course, in the night season. See *Beck v. State of Ohio,* 379 U.S. 89, 3 Ohio Misc. 71.

Paul Clark was thereafter indicted; he obtained a lawyer and he was released on bond.

A day or two before the trial, his lawyer notified the trial court of the inability of Clark to pay for a lawyer, and the lawyer of his choice was given a court appointment. At that time, the lawyer asked for his associate to be appointed chief of trial counsel, which was done. On the next day after these appointments, the case, which had been set for hearing for some time, came on to be tried. Counsel asked for a continuance because of the inability to find two defense witnesses. When it became apparent that Paul Clark had gone to another city to get work and had not consulted his lawyer; and that the witnesses lived in Akron, the trial judge ordered the trial to

proceed. No exception or further objection to the trial proceeding was made.

In the course of the trial, it was shown by Paul Clark's own testimony that he had been incarcerated in penal institutions and jails, and was reasonably familiar with what could occur if he was found guilty of the offense charged. No objection was made to the introductions, by oral testimony, of conversations with the police officers while the officers were investigating the presence of the articles in Clark's possession, later discovered to be those of the All Gas Products Company. See *Carnley v. Cochran,* 369 U.S. 506.

Paul Clark, in his testimony, told of those with whom he had been drinking before and after the offense with which he was charged. He was intoxicated, or nearly so, when he was arrested. These persons whom Clark claimed were his drinking partners on the night in question, also testified, one of them insisting that it was himself, and not Clark, who sought to sell the articles; although another Clark witness said that Clark was trying to sell the grinder which was on display on the bar at the cafe where he was met by the police officer.

The jury, with conflicting evidence as to the conduct of the witnesses for Clark, and Clark himself, could only be disturbed as to their actions, and the evasive replies given. From the testimony adduced in this trial, they could arrive at only one true verdict, and that verdict had to be guilty.

Our examination of the testimony and evidence presented herein compels us to say that none of the errors assigned are well taken. The judgment in this case must be affirmed.

JUDGMENT AFFIRMED.

DOYLE, P.J., BRENNEMAN, J., and HUNSICKER, J., concur.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL.

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the Plaintiff-Appellee recover from the Defendant-Appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

JAN 28 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 935.

PAUL CLARK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

JAMES V. BARBUTO,
Prosecuting Attorney of
Summit County, Ohio,

STEPHAN M. GABALAC,
Assistant Prosecuting Attorney,
Summit County Court House,
Akron, Ohio 44308,
Counsel for Respondent.

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In the Supreme Court of the United States

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PAUL CLARK,

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vs.

STATE OF OHIO,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

STATEMENT OF CASE.

On the morning of June 6, 1964, the manager of the All-Gas Products Company of Barberton, Ohio, discovered that his place of business had been broken into, and merchandise stolen. Invoices were scattered over the floor and display articles were missing. The glass in a rear window was broken and pieces of glass were scattered on the floor. He immediately reported this to the Barberton Police.

On that same morning, June 6, 1964, detectives of the Akron, Ohio, Police Department received a telephone call that a man was attempting to sell some grinder equipment in a suspicious manner at Joe's All Star Cafe in Akron, Ohio. When investigating detectives arrived at the cafe, they found a man, later identified as the defendant, Paul Clark, at the bar with an abrasive grinder. Testimony by

police and at least one of defendant's witnesses indicated that the defendant, Paul Clark, was at the bar and that he attempted to sell the grinder to one of the Akron detectives who was in plain clothes. (R. 81, R. 128, R. 133.) Further testimony indicated that the defendant had been drinking alcoholic beverages.

When one of the detectives asked Clark whether he had more equipment to sell, defendant Clark voluntarily took him to his car in the parking lot and there displayed the rest of the equipment, which was located in the back seat and trunk of Clark's auto. There is testimony that Clark voluntarily opened the car door and trunk. (R. 84.)

The detectives, after considering the defendant's suspicious manner in attempting to sell the grinder at a very reduced price in the bar and after viewing the equipment in the car which Clark voluntarily showed to the detectives, placed the defendant in custody, seized the questioned equipment which they reasonably believed to be stolen, and took the defendant Clark, along with another man they found sleeping in the front seat of the car, to the Akron Police Station for investigation and questioning. This was approximately 9:30 a.m. on that morning.

Upon arriving at the police station, according to defendant's own testimony, the police prior to questioning him, allowed the defendant to sleep off the effects of his drinking. Defendant Clark testified that he slept till noon. (R. 156.) The detectives began questioning the two men at various times that late morning and early afternoon. Various witnesses testified that the defendant made certain oral statements which were in substance that after the bars closed the prior night, he, Paul Clark, and another unarmed man probably went to Barberton and broke into a place. The defendant denied making such oral statements when he took the stand in his own defense.

Among the various items which were found in the defendant's possession were some cigars which were imprinted, "All Gas." The Akron Police located a company by that name in Barberton, Ohio, and upon checking with the Barberton Police, learned that the All Gas Products Company had been burglarized the prior night. The management were called to the Akron Police Station where they identified the various items found in defendant's possession as those articles stolen from their company. Based upon this information, the police charged the defendant with being a suspicious person under a municipal ordinance, Section 1179.01, Akron City Code, pending further investigation and identification of a good footprint which was found on one of the scattered invoices discovered on the floor of the burglarized building. The footprint was later identified by an expert witness to have been made by the shoe the defendant had been wearing at the time he was arrested.

Petitioner was thereafter indicted on December 18, 1964; he obtained an attorney and he was released on bond to await trial. Clark entered a plea of "not guilty" at arraignment on January 15, 1965, and the journal entry of that date recites Attorney Patrick Simon of Akron, Ohio, as attorney of record for Clark.

The case was set for trial May 26, 1965. The day prior to trial, Attorney Simon approached the Court and represented that the defendant had no funds with which to pay counsel and he asked the Court to appoint him. The Court acceded to his request and appointed him officially that day. Later that day, Mr. Simon again approached the Court and indicated that he would like to have associate counsel appointed as chief counsel, and that he be permitted to withdraw as chief counsel. The Court generously granted this request and appointed Mr. Simon's recom-

mendation, Mr. Harold Binns of Akron, Ohio, only after Mr. Binns indicated that he was prepared to go forward with trial as scheduled. (R. 3-5.)

That same afternoon, the State of Ohio turned over its entire file to Mr. Binns which included the most damaging report of the State's expert witness who positively identified the defendant's shoe as making the footprint that was found in the burglarized building.

The trial commenced on the afternoon of May 26, 1965. The defendant was represented by privately retained counsel for more than five months prior to trial. This same counsel was appointed when it was determined defendant couldn't pay him and this same counsel sat at the trial table during the trial. (R. 5, 6.)

Immediately prior to opening statements after impanelling of a jury, defense counsel, Attorneys Harold Binns and Patrick Simon, indicated concern that they had been unable to locate some witnesses for the defense and for this reason requested a continuance. The Court denied the request, and ordered subpoenas for the witnesses who were later found, and did testify at trial. (R. 3-5.)

During the trial, the Court permitted certain testimony concerning statements made by petitioner while in the custody of police. The owner of the business was permitted to testify to certain statements made in his presence by the petitioner. (R. 36.) Counsel for petitioner objected not to the statement but to the owner testifying as to what the police observed. (R. 36-37.)

The Court permitted a Barberton police officer to testify that petitioner stated, "It looks like you got me." It is true that counsel objected to this, but on specific grounds that such was improper direct testimony in that he was giving an impression. The police officer further testified that petitioner stated, "Well, I probably did it but I can't recall it because I have been drinking so much."

There was no objection to this nor to the testimony by the Akron Police officer as enumerated on page eight of the petitioner's brief.

When evidence in the nature of a photograph of the seized items was introduced, counsel objected on the specific ground that the picture was not the best evidence and at no time during the course of the trial was there any objection based upon an alleged illegal search and seizure. (R. 96.)

Defense counsel moved for a directed verdict at the end of the State's case and stated the specific grounds for such directed verdict on the State's alleged failure to prove the specific elements of the crime, specifically: venue, night season, and intent. The motion for a directed verdict was overruled, and the defendant failed again to present such at the end of the defendant's case. The case went to the jury and said jury returned a verdict of guilty to each count of the indictment.

REASONS IN OPPOSITION TO GRANTING THE WRIT.

I.

There is no doubt that an accused in a criminal case is entitled to have counsel and there is no doubt, in the case at bar, that the defendant Clark did, in fact, have counsel. The issue raised by the appellant in reason number one for granting a writ of certiorari appears to be that the defendant's case suffered from lack of pre-trial preparation and denial of effective assistance of counsel.

The cases cited by the appellant as authority for his position may be distinguished from the instant case. In *Powell vs. Alabama,* 287 U. S. 45 (1932), where the three negroes were accused of raping two white girls, the trial court, in a most casual fashion, waited until the very morning of the trial to appoint an attorney.

The appellant, in the present case, was arraigned on January 15, 1965, and counsel was appointed on that day. The appellant retained counsel from this date through his trial on May 26, 1965.

In *Williams vs. Kaiser,* 323 U. S. 471 (1945), cited on page 11 of appellant's brief, the defendant requested counsel, none was appointed and he pleaded guilty to armed robbery which was a capital offense in Missouri. In *Von Moltke vs. Gillies,* 332 U. S. 708 (1948), the defendant purportedly waived her right to be represented by counsel and pleaded guilty to conspiring to violate the Espionage Act, a capital offense. It appeared that this defendant, who was indigent and was not provided with an attorney, had entered her plea in reliance upon incorrect advice given to her by an F. B. I. lawyer-agent and it appeared to the court that she had not intelligently and understandingly waived her right to counsel.

In *Reece vs. Georgia,* 350 U. S. 85 (1955), Reece, a Negro, was convicted of the rape of a white woman in Cobb County, Georgia, where a Georgia rule of practice required him to challenge the composition of the grand jury before indictment. Attorneys were appointed after indictment and attempted to quash the indictment. The trial court held that such motion to quash was not timely made.

In the case of *Hawk vs. Olson,* 326 U. S. 271 (1945), the defendant was charged with murder, and the court had begun to seat a jury for purposes of trial, over the objection of the defendant who had requested a continuance for the purpose of consulting with counsel. At this point, two members of the office of Public Defender entered the case without ever having consulted with the defendant.

The facts in this case presently before the court, do not show that the defendant was denied the appointment of counsel as in *Williams;* was not coerced or misled into waiving his right to an attorney as in *Von Moltke;* was not precluded, by a rule of court, subsequent to appointment of counsel from raising any issue concerning the legality of the proceedings prior to the appointment, as in *Reece,* and was not appointed counsel for the very first time after three members of the jury had already been called, as in *Hawk.*

We join with the appellant in looking to the case of *Joseph vs. United States,* 375 U. S. 977 (1964), for an answer to the issues raised herein. In this case the appellant was indicted on April 13, 1961, at which time he requested a week's continuance for the purpose of securing counsel. On April 24, 1961, he pleaded not guilty with counsel and trial was set for May 2, 1961. He moved for a continuance on April 24, 1961, which was denied. The case involved six counts of violating the U. S. Narcotics law. The court, citing from the case of *Ray v. United States* (8th Cir. 1952), 197 F. 2d 268, at page 271, stated, "Whether the time allowed counsel for a defendant for preparation for trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and the pertinent facts, and the availability of material witnesses." The court held that the defendant had not been denied the effective assistaince of counsel.

This was also true in the case of *Avery v. Alabama* (1940), 308 U. S. 444, where the Supreme Court affirmed a death sentence where the attorneys had three days to prepare the defense.

In the case at bar, the defendant had over four months to prepare for trial and a new counsel was appointed for defendant the day before trial only on the basis that he

would be prepared to go forward the next day. To aid him in this preparation, he had the assistance of defendant's previous counsel, who had been on the case for four months, who sat with him during the course of trial. He also had the complete file of the prosecutor's office which had been turned over to him the day before trial.

We draw the court's attention to the fact that no continuance was asked for the purposes of preparing for trial but was made for securing witnesses which witnesses were subpoenaed and appeared for the defense. The appellant's position under reason one is not well taken.

II.

It is submitted that certain oral statements made by appellant, Paul Clark, to police officers were not a confession and the admission of such statements did not violate appellant's constitutional rights.

When Paul Clark was questioned he made numerous conflicting oral statements as to how he obtained the articles found in his possession. When he was confronted with cigars imprinted "All-Gas," he stated that he and another man probably went out to Barberton and broke into a place.

Appellant urges that this case falls within the doctrine set down in *Escobedo v. Illinois,* 378 U. S. 478, 4 Ohio Misc. 197. Appellee submits it does not.

At the outset of this argument appellee submits that the new doctrine concerning admissibility of confessions which was recently enumerated by the U. S. Supreme Court in *Miranda v. Arizona,* 34 LW 4521 does not apply to the case now before the Court.

The Supreme Court in *Johnson v. New Jersey,* 34 LW 4592 when called upon to determine whether *Escobedo*

v. Illinois, 378 U. S. 478 (1964) and *Miranda vs. Arizona,* 34 LW 4521 should be applied retroactively held that "*Escobedo* affects only those cases in which trial began after June 22, 1964, the date of that decision." The Court further held "that *Miranda* applies only to cases in which trial began after the date of our decision one week ago" (June 13, 1966). This case at bar went to trial May, 1965, and would fall under *Escobedo* if applicable.

Appellant urges that the *Escobedo* rule should be interpreted to conclude that an accused must be affirmatively advised of his right to remain silent and is entitled to assistance of counsel at the time of interrogation. *Miranda* is interpreted to so hold, but *Escobedo* cannot be. It is significant that the Supreme Court in *Johnson, supra,* restated the precise holding of *Escobedo* when it stated:

> "Apart from its broad implications, the precise holding of *Escobedo* was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial,
>
> > '(where) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent * * *' 378 U. S., at 490-491.
>
> Because *Escobedo* is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided.
>
> As for the standards laid down one week ago in *Miranda,* if we were persuaded that they had been

fully anticipated by the holding in *Escobedo,* we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of *Escobedo,** however, have impelled us to lay down *additional guidelines* for situations not presented by that case. This we have done in *Miranda, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966.* (Emphasis added.)

* For example, compare *People v. Dorado* 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), and *People v. Dufour* __ R. I.__, 206 A. 2d 82 (1965), which construe Escobedo broadly with *People v. Hartgraves,* 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), and *Browne v. State,* 24 Wis. 2d 491, 131 N. W. 2d 196 (1964)."

It is evident that *Escobedo* is something less than *Miranda* and applies only to those circumstances where defendant requested counsel and was denied. The additional guidelines established by the *Miranda* case are not available to this appellant.

It is the duty of any court who is interpreting and applying the rule in *Escobedo* not to ascribe more to that opinion than was intended by its author. Mr. Justice Goldberg immediately defines the question that will be answered in the ensuing opinion when at page 478 he states:

"The critical question in this case is whether, *under the circumstances the refusal* by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of the 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made

> obligatory upon the States by the Fourteenth Amendment,' *Gideon vs. Wainwright,* 372 U. S. 335, 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." (Emphasis added.)

By using the words "under the circumstances" we are immediately put on notice that the court here is not considering the right to counsel to be an absolute right. If it were absolute the only issue would be whether or not the defendant had an attorney and the "totality of circumstances" rule would not apply. The issue here is even more narrowly defined and limited to that situation where defendant's request to consult an attorney has been denied.

This decision, in its simplest terms, bars the use in evidence of a statement taken from a man under arrest and held in custody as a suspect for a particular crime while he was denied his request to consult with his lawyer and, at the same time, not effectively warned of his right to remain silent!

It is submitted that *Escobedo* is not applicable in the instant case. In the case at bar our attention is drawn immediately to the fact that upon the trial of this case there was no objection made, nor preserved in the record, to the admission into evidence of statements made by Defendant to the police.

The statements were made voluntarily and there is no issue raised on this question. The burden is upon the defendant to show that his constitutional rights to be represented by counsel and privilege against self-incrimination were violated and not upon the state to show whether they had or had not violated them once it was admitted that the statement was voluntary.

The Bill of Exceptions does not reflect the fact that the investigation had reached the accusatory stage and

there was no testimony by the defendant to the effect that he had requested counsel and his request had been denied. This was the only issue raised by *Escobedo* and without that question being present in the case at bar the *Escobedo* case has no application.

The rule in the case of *Escobedo* does not apply to the present case on its facts alone and, if it were held to apply, then appellant's right to invoke its principles were waived by defendant by their failure to make any objection to the introduction of the disputed testimony.

III.

Evidence from state's witnesses and at least one of Petitioner's witnesses indicated that the Petitioner, Paul Clark, was in Joe's All Star Cafe at the bar attempting to sell an abrasive grinder at a price much below its value when detectives entered the place. Detective Louthan testified that he asked the Petitioner, who he identified in the Courtroom, how much he wanted for the grinder and after Clark gave him his price he asked Clark whether he had more equipment for sale (R. 83). Petitioner answered in the affirmative and took Louthan and his companion to his car in the parking lot adjacent to the bar.

Louthan testified that he looked into the car and there viewed various pieces of equipment openly displayed in the back seat. He stated that he also observed a man sleeping on the front seat who was later identified as Cliff Fortune and who testified in Petitioner's behalf at trial. Clark was asked whether he had anything else and at this time Petitioner voluntarily opened the trunk of his car and showed his wares. Petitioner testified on direct examination (R. 162) that there was no question that the items were in his car but that when he opened the trunk he was surprised to find the equipment.

The detectives identified themselves and inquired of petitioner, how he came by this equipment. Petitioner gave evasive answers. Cliff Fortune was awakened and also asked. He also gave evasive answers. (R. 85.)

The detectives considered the petitioner's suspicious manner in the bar. They considered what they had seen in open view in the back seat of the trunk which petitioner voluntarily opened. They further considered petitioner's evasive answers. Detective Louthan has 23 years of experience as a police officer and a detective. Based upon this and what he had personally observed of Petitioner's conduct, he arrested Petitioner at this time, and immediately thereafter seized the equipment. There was never a search but only a seizure after arrest. There was no need for a search.

The State of Ohio requires that an issue must be raised at the first opportunity. In *State v. Davis,* 1 Ohio St. 2d 28 (1964), paragraph 1 of the syllabus states:

> "1. Where there has been an illegal search and seizure of evidence tending to incriminate an accused and such accused and his counsel know about such search and seizure in ample time to prepare and file a pre-trial motion to suppress such evidence, a failure to do so will amount to a waiver by the accused of his right to object to admission of that evidence against him."

The rationale behind this rule is that objection to the introduction of evidence at trial raises no question other than the competency, relevancy, and materiality of the evidence tendered. Accordingly, any collateral questions as how the evidence was obtained should not be raised during trial, but should be raised by pretrial motion, and failure to file a timely motion to suppress constitutes a waiver of that right. The *Davis* rule was recently applied in *State v. Woodwards,* 6 Ohio St. 2d 14 (1966).

This Court in footnote 9 to *Mapp v. Ohio*, 367 U. S. 643, 659 (1961) recognized the undoubted right of the states to adopt reasonable state procedural rules.

It should be noted that petitioner and his counsel had knowledge that evidence was seized by police. Petitioner failed to file a motion to suppress evidence prior to trial, and in fact, never even objected to admission into evidence of testimony concerning the stolen articles. An objection was made to the introduction of a picture of the stolen item but specifically on the grounds that the picture was not the best evidence. The search and seizure issue was not raised until the appellate level. It is therefore submitted that any question on the admissibility of evidence based upon a claimed illegal search and seizure must be timely made as soon as reasonably proper. Petitioner's failure to raise this issue prior to trial or even during trial constitutes a waiver of the right.

Further, should this Court not consider such a waiver, it is respectfully submitted that in fact there was never a search made. Police officers need not blindfold themselves in properly performing their duties. In *Smith v. U. S.*, 2 F. 2d 715, the Court held that consent is not necessary for an officer to seize evidence in a vehicle which is open and visible to the eye, either by daylight or by shining a light into such vehicle. So also *Ellison v. U. S.*, 206 F. 476.

The officer did view the abrasive grinder in the bar, did view various other items open to view in the back seat of petitioner's car, and did view additional items of equipment in the trunk which petitioner voluntarily opened. No force was ever used.

The question then becomes, was the seizure of the stolen goods incident to a lawful arrest?

The question here involves a consideration of Section 2935.04, Ohio Revised Code, as follows:

> "When a felony has been committed, or there is reasonable grounds to believe a felony has been committed, any person without a warrant, may arrest another whom he has reasonable cause to believe is guilty of an offense, and detain him until a warrant can be obtained."

The question then is, did the police officers have probable cause to arrest the petitioner? In *Brinegar v. United States,* 338 U. S. 160, this Court held that "in dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act."

Probable cause exists where "the facts and circumstances within the arresting officers' knowledge of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense had been committed." *Carol v. United States,* 367 U. S. 132, at 162. See also *Husty v. U. S.,* 282 U. S. 694; *Drumba v. U. S.,* 268 U. S. at 441.

Further guidelines was set by this Court in *Beck v. Ohio,* 379 U. S. 89:

> "Whether an arrest is constitutionally valid depends on whether, at the moment an arrest is made, the officers have probable cause to make it—whether, at that moment the facts and circumstances within their knowledge and of which they had trustworthy information are sufficient to warrant a prudent man in believing the Petitioner had committed * * * an offense."

Police officers, in the instant case, had sufficient facts within their knowledge to arrest the defendant without a warrant based upon probable cause to believe the petitioner had committed a felony. The officers viewed the petitioner in the bar, trying to sell the grinder at a greatly

reduced price. His conduct was suspicious. The officers viewed the grinder in the bar; they viewed various articles of equipment in the back seat of petitioner's car. They observed the additional items in the trunk of petitioner's car which Clark exposed to them, and they took note of Clark's evasive answers to questions about where he got the equipment. Based upon all this and their twenty years of experience as police officers, they lawfully arrested the petitioner and any seizure incident thereto was proper.

Petitioner cites *Preston v. U. S.*, 376 U. S. 364 (1964) as authority for their position. This case is not applicable to the instant case since in *Preston* the petitioner was arrested, taken to the police station and then officers later returned to the scene and searched the car. That court held that the search was too remote in time. In the instant case, there was no search, and the seizure was immediately incident to the lawful arrest.

The petitioner alleges that the detectives in the instant case used subterfuge and deception to gain the consent of petitioner to the alleged search and seizure citing *Gatewood v. United States,* 209 F. 2d 789 (D. C. Cir. 1953), as authority. In *Gatewood,* the petitioner was already in custody, a police officer went to her home and stated to the party within that he was a messenger of Western Union Telegraph Company, and as soon as the door was partly opened the police forcibly broke into the apartment.

In the instant case, no affirmative statement was made to petitioner to deceive him. No force of any kind was ever used. Detectives only made reasonable inquiries of the petitioner in a very discreet manner during the course of their investigation. At this time, there was no reason to identify themselves or to arrest the petitioner. Only

after investigating was there reasonable grounds to believe a felony had been committed by the petitioner.

Petitioner argues that police waited twelve weeks before a felony warrant was issued and this therefore will invalidate the original arrest. Respondent submits that this is not true. At time of arrest, the officer must only have probable cause to believe a felony had been committed. When he has such, the arrest is valid and any seizure incident thereto is proper. In the instant case police investigation of the case continued. Police processed the footprint found in the burglarized building, with the shoe that the defendant was wearing at time of arrest and they were able to positively match the two. Petitioner was given every possible doubt before his case was taken to the grand jury. Substantial justice was done herein.

For these reasons, respondent urges that pictures of the stolen goods were properly admitted into evidence.

CONCLUSION.

For the foregoing reasons, this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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